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92-951

Supreme Court, U.S.
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No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

N. WALTER GOINS, PETITIONER,

-VS-

DALE W. LANG, ET AL., RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May an Article III district judge of the United States District Court for the District of Minnesota deny a hearing to petitioner as a plaintiff party who has filed the case originally in the district court?

2. May the Article III Federal Courts vest the judicial power of the United States in courts not established under Article III of the Constitution without violating the doctrine of the Separation of Powers as well as Article III of the Constitution?

3. May a case or controversy involving private rights and constitutional claims be properly removed from a United States District Court to that District Court's Bankruptcy judges where that case was originally brought in the United States District Court from and to which it is

removed, whether such removal occurs by virtue of 28 U.S.C. §1452 or 28 U.S.C. §157?

4. May a plaintiff who brings an action in the District Court of the United States be deprived of an opportunity to adjudicate all aspects of that case before an Article III judge without a violation of his due process rights?

5. Is an order of the United States District Court denying the plaintiff's motion for default judgement prior to final judgement in the case reviewable pursuant to 28 U.S.C. §1291 where the district court bases its denial solely on its holding that a case was removed from it to its bankruptcy unit pursuant to Title 28 U.S.C. §1452?

6. Does the jurisdictional scheme as

established under the Bankruptcy Amendments and Federal Judgeship Act of 1984 unconstitutionally vest the judicial power of the United States in a court lacking the constitutional requisites of an Article III court by providing for the removal from an Article III court to an Article I legislative court, as well as violate the requirement of Congressional regulation of the jurisdiction of federal courts?

7. Does the filing of a notice of removal pursuant to bankruptcy rule 9027 remove claims and causes of action against parties defendant not joining in the notice of removal?

PARTIES

The parties to the judgment of the court below are the following:

N. Walter Goins is the Petitioner.

Dale W. Lang, Ronald R. Jensen, Halcomm, Inc., a Minnesota corporation, KX Acquisition Limited Partnership, Donald R. Johnston, Larry B. Ricke, Thomas J. Lallier, Syndicated Communications, Inc., and its subsidiary, Syncom Capital Corporation, and Broadcast Capital, Incorporated are the Respondents.

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PETITION FOR A WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE

EIGHTH CIRCUIT

Petitioner, N. Walter Goins, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on July 17, 1992; petition for rehearing denied on September 1, 1992 in the above entitled matter.

Petitioner hereby gives notice pursuant to Supreme Court Rule 29.4.(b) that the constitutionality of an Act of Congress is or may be drawn in question by this proceeding, and therefore, 28 U.S.C. §2403(a) may be applicable. Further, petitioner states that the court below has

not certified to the Attorney General the fact that the constitutionality of an act of Congress may be or has been drawn in question. But see and compare Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 56 Sup. Ct. 466, 80 L.Ed 688 (1936) (Brandeis, J. concurring).

I.

OPINIONS BELOW

The judgement of the United States Court of Appeals in Goins v. Lang, et al., Docket No. 92-2542MNMI, was entered on July 17, 1992 and was without opinion. It is unreported and is attached as Appendix I.

The order of the United States Court of Appeals for the Eighth Circuit granting petitioner's request for further time to petition for rehearing dated July 27, 1992 is unreported and is attached as Appendix VIII.

The order of the United States Court of Appeals for the Eighth Circuit dated September 1, 1992, denied petitioner's request for rehearing to the panel without opinion. It is unreported and is attached as Appendix IX .

The original order of the district court denying plaintiff's motion for default judgment is unreported. It was entered by the district court on May 26, 1992. It is attached as Appendix VI .

The Memorandum and Order of the district court is unreported. It was entered on May 8, 1992. It is attached as Appendix IV .

The order of the Magistrate Judge of April 14, 1992 is unreported. It is attached as Appendix II .

The order of the United States Bankruptcy Court for the Minnesota District denying the motion of respondents Syndicated Communications, Inc., Syncom

Capital Corp., and Broadcast Capital, Inc. was entered May 4, 1992 and is unreported. It is attached as Appendix III.

The order of the United States Bankruptcy Court for the Minnesota District granting ex parte relief to respondents was entered May 14, 1992 and is unreported. It is attached as Appendix V.

The Transmittal of Remanded Adversary Proceeding Papers to Clerk of District Court by the United States Bankruptcy Court for the Minnesota District is dated June 9, 1992 and is unreported. It is attached as Appendix VII.

II.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit in Goins v. Lang, et al., 92-2542-MNMI was entered on

July 17, 1992. Petitioner was granted an extension of time to request rehearing from the court of appeals on July 27, 1992 until August 14, 1992. Petitioner timely sought rehearing on August 13, 1992 by filing a Petition for Rehearing to the United States Court of Appeals for the Eighth Circuit. Petitioner's timely request for rehearing to the panel of the court of appeals was denied on September 1, 1992.

This Court has jurisdiction to review the judgment of the court of appeals by grant of this petition for a writ of certiorari based on 28 U.S.C. § 1254 (1) and 28 U.S.C. § 2101.

III.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION ARTICLE III:

Section 1. The judicial Power of the United States, shall be vested in one

supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens

of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. * * *

IV.

STATUTES/RULES INVOLVED

28 United States Code Section 157(a):

Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or

arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

28 UNITED STATES CODE § 1334(a):

Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

28 UNITED STATES CODE § 1334(b):

Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 UNITED STATES CODE § 1452:

Removal of claims related to bankruptcy cases

a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

FEDERAL BANKRUPTCY RULE 9027:

(a) Notice of Removal.

(1) Where filed; Form and Content. A notice of removal shall be filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending. The notice shall be signed pursuant to Rule 9011 and contain a short and plain statement of the facts which entitle the party filing the notice to remove, contain a statement that upon removal of the claim or cause of action the proceeding is core or non-core and, if non-core, that the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy judge, and be accompanied by a copy of all process and pleadings.

(2) Time for Filing; Civil Action Initiated Before Commencement of the Case

Under the Code. If the claim or cause of action in a civil action is pending when a case under the Code is commenced, a notice of removal may be filed only within the longest of (A) 90 days after the order for relief in the case under the Code, (B) 30 days after entry of an order terminating a stay, if the claim or cause of action in a civil action has been stayed under §362 of the Code, or (C) 30 days after a trustee qualifies in a chapter 11 reorganization case but not later than 180 days after the order for relief.

(3) Time for Filing; Civil Action Initiated After Commencement of the Case Under the Code. If a case under the Code is pending when a claim or cause of action is asserted in another court, a notice of removal may be filed with the clerk only within the shorter of (A) 30 days after receipt, through service or otherwise, of a copy of the initial pleading setting

forth the claim or cause of action sought to be removed or (B) 30 days after receipt of the summons if the initial pleading has been filed with the court but not served with the summons.

(b) Notice. Promptly after filing the notice of removal, the party filing the notice shall serve a copy of it on all parties to the removed claim or cause of action.

(c) Filing in Non-Bankruptcy Court. Promptly after filing the notice of removal the party filing the notice shall file a copy of it with the clerk of the court from which the claim or cause of action is removed. Removal of the claim or cause of action is effected on such filing of a copy of the notice of removal. The parties shall proceed no further in that court unless and until the claim or cause of action is remanded.

(d) Remand. A motion for remand of the

removed claim or cause of action shall be governed by Rule 9014 and served on the parties to the removed claim or cause of action.

(e) Procedure After Removal.

(1) After removal of a claim or cause of action to a district court the district court or, if the case under the Code has been referred to a bankruptcy judge of the district, the bankruptcy judge, may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the court from which the claim or cause of action was removed or otherwise.

(2) The district court or, if the case under the Code has been referred to a bankruptcy judge of the district, the bankruptcy judge, may require the party filing the notice of removal to file with the clerk copies of all records and proceedings relating to the claim or cause

of action in the court from which the claim or cause of action was removed.

(3) Any party who has filed a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, shall file a statement admitting or denying any allegation in the notice of removal that upon removal of the claim or cause of actio the proceeding is core or non-core. If the statement alleges that the proceeding is non-core, it shall state that the party does or does not consent to entry of final orders or judgment by the bankruptcy by the bankruptcy judge. A statement required by this paragraph shall be signed pursuant to Rule 9011 and shall be filed not later than 10 days after the filing of the notice of removal. Any party who files a statement pursuant to this paragraph shall mail a copy to every other party to the removed claim or cause of action.

(f)Process After Removal. If one or more of the defendants has not been served with process, the service has not been perfected prior to removal, or the process served proves to be defective, such process or service may be completed or new process issued pursuant to Part VII of these rules. This subdivision shall not deprive any defendant on whom process is served after removal of the defendant's right to move to remand the case.

(g) Applicability of Part VII. The rules of Part VII apply to a claim or cause of action removed to a district court from a federal or state court and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under the rules of Part VII within 20 days following the

receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief on which the action or proceeding is based, or within 20 days following the service of summons on such initial pleading, or within five days following the filing of the notice of removal, whichever period is longest.

(h) Record Supplied. When a party is entitled to copies of the records and proceedings in any civil action or proceeding in a federal or a state court, to be used in the removed civil action or proceeding, and the clerk of the federal or state court, on demand accompanied by payment or tender of the lawful fees, fails to deliver certified copies, the court may, on affidavit reciting the facts, direct such record to be supplied by affidavit or otherwise. Thereupon the proceedings, trial and judgment may be had in the court, and all process awarded, as if certified copies had been filed.

(i) Attachment or sequestration; Securities. When a claim or cause of action is removed to a district court, any attachment or sequestration of property in the court from which the claim or cause of action was removed shall hold the property to answer the final judgment or decree in the same manner as the property would have been held to answer final judgment or decree had it been rendered by the court from which the claim or cause of action was removed. All bonds, undertakings, or security, or security given by either party to the claim or cause of action prior to its removal shall remain valid and effectual notwithstanding such removal. All injunctions issued, orders entered and other proceedings had prior to removal shall remain in full force and effect until dissolved or modified by the court.

MINNESOTA LOCAL BANKRUPCTY RULE 201:

All bankruptcy cases and proceedings, including any claim or cause of action that is removed under 28 U.S.C. §1452 or that is removed under Bankruptcy Rule 9027, are referred to the bankruptcy judges and shall be assigned among them according to orders made by them.

V.

STATEMENT OF THE CASE

On February 18, 1992, petitioner N. Walter Goins filed a complaint in the United States District Court for the District of Minnesota against the respondents herein asserting claims based on the Constitution and federal statutes.

Petitioner's complaint was duly filed by the office of the clerk of the district court, Francis E. Dosal, assigned a court file number and issued a summons bearing the case number 4-92cv154(HHM).

Petitioner's complaint was for damages based on conduct petitioner alleged violated the federal Racketeering and Corrupt Influences Organization Act (RICO), federal antitrust statutes, and federal civil rights claims and securities law violations by respondents. Among the RICO predicates alleged by petitioner's complaint was violation of 18 U.S.C. §§151, et seq. involving fraud in a title 11 (bankruptcy) case. Among the defendants named by petitioner was the standing trustee of the bankrupt estate of KTMA.

On March 17, 1992, petitioner's counsel received acknowledgement of mail service from local counsel for respondents Syndicated Communications, Inc. and Broadcast Capital, Inc., also two of the named defendants in petitioner's district court complaint. The acknowledgments were sent in response to mail service of the

summons (and complaint) issued by the United States District Court for the District of Minnesota.

On March 20, 1992, petitioner's counsel was served by counsel for respondent Donald R. Johnston with a notice of removal and answer of respondents Donald R. Johnston and Larry B. Ricke. The notice of removal stated that respondents' counsel was causing the case filed in the federal district court in Minnesota District to be "removed" to the United States Bankruptcy Court for the District of Minnesota. The Notice of Removal was grounded on respondents' view that pursuant to Federal Bankruptcy Rule 9027, 28 U.S.C. §§157, 1334, and 1452, as well as Minnesota Local Rule 201, a case originally filed in the United States District Court for the District of Minnesota was removeable to its bankruptcy unit by the filing a notice of removal.

On April 6, 1992, respondents Syndicated Communications, Broadcast Capital, Inc., and their co-respondent Syncom Capital Corp. moved for dismissal of petitioner's claims against them based on Federal Bankruptcy Rule 7012 and filed the motion to dismiss and supporting documents with the United States Bankruptcy Court for the District of Minnesota. Respondents Syndicated and Broadcast noticed a hearing on the dismissal motion before the Chief United States Bankruptcy Judge scheduled for hearing on May 1, 1992.

On April 9, 1992, petitioner, after an unsuccessful effort to schedule or "calendar" a hearing before the district judge assigned the case at time of filing, noticed a motion to strike all pleadings in the case referring to or bearing the caption of the bankruptcy matter which respondents claimed was the basis for

removal of petitioner's complaint. Petitioner, after serving the notice of motion and motion to strike the bankruptcy-related pleadings before the U.S. Magistrate Judge assigned to the case, received an order striking petitioner's motion date from the U.S. Magistrate Judge's calendar because, as the order recited, the case "had been removed to Bankruptcy Court." See Order of the Hon. Franklin L. Noel in Civ. No. 4-92-154 dated April 14, 1992. From that order striking petitioner's hearing date, an appeal was timely taken to the district court judge originally assigned petitioner's case, the Honorable Harry H. MacLaughlin. While petitioner's appeal was pending before the district judge, the bankruptcy court nevertheless considered the motion to dismiss by respondents Syndicated, Syncom, and Broadcast on May 1, 1992. Four of the respondents had

objected to or noticed their non-consent to bankruptcy court final decisions based on Rule 9027(e). Petitioner filed a "Notice of Jurisdictional Objection" with the Bankruptcy Court prior to the hearing, arguing as he had to the district court, that no jurisdiction could obtain in the bankruptcy court over a case originally filed and brought in the district court, and that the filing of Federal Bankruptcy Rule 9027 "notice of removal" was ineffectual to remove a case from the district court for the District of Minnesota to its bankruptcy court. Petitioner also argued that to allow for such a removal of a case pending before an Article III judge to a non-Article III judicial officer, a bankruptcy judge, would violate this Court's ruling in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), by removing the jurisdiction of a

private right matter from the only forum constitutionally authorized to exercise the judicial power of Article III of the Constitution.

Petitioner further argued that the plain words of the removal statute, 28 U.S.C. §1452, as revised in the post-Marathon context, foreclosed removal of a case within the district court itself. Without ruling on petitioner's request that the bankruptcy court determine the removal to be a jurisdictional (and procedural) nullity, the bankruptcy judge nevertheless ruled that the bankruptcy court lacked jurisdiction to grant the respondents' motion to dismiss petitioner's claims because it lacked subject matter jurisdiction under 28 U.S.C. §1334. As a result, the bankruptcy court issued an order denying the respondents' motion to dismiss. On May 5, 1992, respondents

Syndicated, Syncom, and Broadcast filed a second motion to dismiss--this time in the United States District Court for the District of Minnesota and noticing it for a hearing at time to be scheduled before the Honorable Harry H. MacLaughlin, district court judge. In response, petitioner filed a motion for default judgement, arguing that respondents Syndicated and Broadcast had made their first proper defense in the district court some 45 days after their acknowledgement of service of the district court summons and complaint. Petitioner subsequently learned that the earlier appeal from the Magistrate's order regarding bankruptcy removal was affirmed by the district court, despite the fact that the bankruptcy court had ruled that it lacked subject matter jurisdiction pursuant to 28 U.S.C. §1334.

By an order and memorandum entered

May 8, 1992, the district court ruled the magistrate lacked jurisdiction to rule on petitioner's motion because the case had been properly removed to bankruptcy court by virtue of either the automatic reference provisions of the Minnesota Local Bankruptcy Rule 201, or removed by virtue of Rule 9027, 28 U.S.C. §1452 and their concomitant provisions 28 U.S.C. §§157 and 1334. Subsequently, the bankruptcy court held a hearing on all of the parties motions to remand the case to district court. While these motions were pending, the district court on May 26, 1992 sua sponte denied the petitioner's motion for default judgement. It did not rule upon or refer to the pending motion to dismiss filed by respondents Syndicated, Broadcast, and Syncom. In its May 26, 1992 Memorandum and Order, the district court repeated its earlier ruling that the March 20, 1992 Notice of Removal

pursuant to 28 U.S.C. §§157, 1334, 1452 and Federal Bankruptcy Rule 9027, as well as local rule 201 caused petitioner's cause to be removed to the bankruptcy court. See Memorandum and Order dated May 26, 1992 attached as Appendix VI.

Petitioner timely appealed the order of the district court on June 12, 1992 to the United States Court of Appeals for the Eighth Circuit. Prior to the Court of Appeals setting a briefing schedule (and before notice of the docketing of the appeal), respondents Syndicated, Syncom, and Broadcast filed a motion to dismiss the appeal in the Court of Appeals based on their position that the court of appeals lacked jurisdiction to decide petitioners' appeal prior to final judgement in the district court. Respondents asserted that the order denying default judgement by the district court was only reviewable under 28 U.S.C.

§1291 after final judgement, and that such an order was likewise not appealable as a "final order" under this Court's line of decisions beginning with cases such as Cohen v. Beneficial Loan Corp. 337 U.S. 541 (1948) and including Coopers & Lybrand v. Livesey, 437 U.S. 463, 98 S. Ct. 2454 (1978). Before the date for petitioner to respond to the motion to dismiss in the court of appeals, the court below dismissed petitioner's appeal and granted respondents' motion by finding that it lacked jurisdiction over the appeal. See Judgment dated July 17, 1992 of the United States Court of Appeals for the Eighth Circuit attached as Appendix I.

Petitioner, after obtaining an extension of time to petition for rehearing, timely filed a petition for rehearing to the court of appeals on August 13, 1992. The court of appeals denied petitioner's request for rehearing

on September 1, 1992. See Orders dated July 27, 1992 and September 1, 1992 in Appendices VIII and IX.

Petitioner now seeks a writ of certiorari from this Court to the Eighth Circuit United States Court of Appeals to review its judgement and to determine if it has sanctioned the lower court in departing from proper and accepted judicial procedures in allowing a case originally filed in the district court to be removed to its bankruptcy court, and alternatively, to determine if such a jurisdictional scheme is constitutional in light of the doctrine of Separation of Powers and Article III of the Constitution.

VI.

JURISDICTIONAL BASIS IN THE COURT BELOW

The United States Court of Appeals for the Eighth Circuit had jurisdiction to

review the order of the United States District Court for the District of Minnesota based on section 1291 of Title 28, U.S.C. and the collateral order doctrine enunciated by this Court in Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1948). The United States District Court for the District of Minnesota had jurisdiction over petitioner's case based on section 1331 of Title 28, U.S.C.

VII.

REASONS FOR GRANTING THE WRIT

A. THIS CASE RAISES THE ISSUE AS TO WHETHER THE POST-MARATHON REVISIONS OF BANKRUPTCY JURISDICTION AS ENACTED BY THE CONGRESS IN THE BANKRUPTCY AMENDMENTS AND FEDERAL JUDGESHIP ACT OF 1984 HAVE, IN AN ATTEMPT TO PROVIDE ARTICLE III COURTS WITH CONTROL OF BANKRUPTCY-RELATED CASES, CREATED AN OPPORTUNITY FOR THE LOWER

FEDERAL COURTS TO DEPRIVE LITIGANTS OF ARTICLE III ADJUDICATION OF CASES AND CONTROVERSIES WITHIN THE JUDICIAL POWER OF THE UNITED STATES.

The Court should grant the writ to determine if the post-Marathon revisions of the bankruptcy jurisdiction of the federal courts has created a jurisdictional cul-de-sac, allowing Article III district courts to abdicate the judicial power under the Constitution in favor of courts not exercising the judicial power of Article III.

More serious than the apparent constitutional concerns addressed by this Court in Marathon are the problems which are lurking in the new statutory jurisdictional scheme of 28 U.S.C. §§157, 1334, and 1452, if they indeed provide for and allow Article III courts to lose or abandon their jurisdictional prerogatives, as distinct to their being unrecognized in

the first instance. See Marathon, Granfinanciera.

B. THIS CASE PROVIDES THE COURT WITH THE OPPORTUNITY TO DECIDE THE ISSUE OF THE PROPRIETY OF INFRA-DISTRICT COURT REMOVAL OF CASES AND THE APPROPRIATE JURISDICTIONAL RELATIONSHIP BETWEEN THE DISTRICT COURTS AND THE BANKRUPTCY COURTS, WHICH IS AS YET UNSETTLED AND UNCLEAR IN THE LOWER COURTS AND IS FUNDAMENTAL TO THE DICTATES OF THIS COURT'S DECISIONS IN MARATHON AND GRANFINANCIERA.

This Court should also settle an issue regarding the procedural and jurisdictional requirements of the Bankruptcy Amendments and Federal Judgeship Act of 1984 in order to resolve them clearly for the guidance of the lower federal courts. The issue of the removability of cases originally filed in the federal district courts is one that

has led to a range of decisions--and, in fact was predicted to lead to divergent and unsettled outcomes immediately after the passage of the Bankruptcy Amendment and Federal Judgeship Act of 1984. See Gibson, "Removal of Claims Related to Bankruptcy Cases: What Is a 'Claim or Cause of Action?'" 34 UCLA LAW REVIEW 1 (1986); King, "Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984", 38 VAND. L. REV. 675 (1985).

Further, the circuits have not dealt with the issue of the propriety and availability of removal of district court cases, petitioner suspects, in part, because of the unreviewability of decisions regarding remand as provided in 28 U.S.C. §1452(b).

Another plausible reason for the absence of any guidance as to the availability of the removal provision of 28 U.S.C. §1452 with respect to cases

originally filed in the federal district court, is the recent self-restraint exercised by many of the federal bankruptcy courts which have faced the issue whether squarely or indirectly. (The bankruptcy court for the Eastern District of Pennsylvania in In Re New York City Shoes, Inc., 1989 WL 112792 (Bankr.E.D.Pa.) stated: "Furthermore, the 'competing' litigation is pending in the district court, the very court of which this court is a unit. The district court has the power to withdraw reference of bankruptcy cases and proceedings from us to itself as it sees fit. 28 U.S.C. §157(d). It is very doubtful that we have the power to withdraw cases to this court from the district court. See Thomas Steel Corp. v. Bethlehem Rebar Industries, Inc., 101 B.R. 16 (Bankr. N.D.Ill.1989); and Helena Chemical Co. v. Manley, 47 B.R. 72, 74-75 (Bankr.N.D.Miss.1985). Our hearing

and deciding this claim, which is paralleled by the case before Chief Judge Fullam in the district court, would be effectively, removing a case already submitted to the district court to this court. Such a supervening jurisdictional event would take on constitutional dimensions. See Granfinanciera v. Nordberg, 109 S.Ct. 2782, 2794-97 (1989); and Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 73-76.").

The bankruptcy courts and, when the issue has reached them, the district courts have taken two divergent positions regarding the removal of cases originally filed in the district court. And, in arriving at the two divergent positions, the lower courts have set forth variations of two major themes emanating from the dictates of Marathon and its progeny.

THE "REMOVAL AVAILABLE" POSITION

Immediately after the revision of the bankruptcy jurisdiction enacted by the Congress, the bankruptcy courts and district courts recognized the critical change enacted by 28 U.S.C. §1452 which replaced the court to which a case is removed from "bankruptcy court" to "district court." Nevertheless, in Philadelphia Gold, 56 B.R. 87 (Bkrtcy.E.D.Pa. 1985), the Bankruptcy Court for Eastern District of Pennsylvania held that legislative enactment of 28 U.S.C. §1452 and its use of the term "district court" as the destination of removed claim or cause of action did not preclude a case originally brought in the district court from being subject to removal by virtue of the provisions of 28 U.S.C. §1452. Moreover, that bankruptcy court found no constitutional shoals lying in the path of such an infra-district

court removal. See also Raff v. Gordon, 58 B.R. 988 (E.D.Pa.1986); cf. In re Chapman, 132 B.R. 153 (Bkrtcy.N.D.Ill.1991).

THE "NON REMOVAL" POSITION

The major case after Philadelphia Gold to hold that infra-district court removal under 28 U.S.C. §1452 is not available as to cases originally filed in the district courts is Thomas Steel v. Bethlehem Rebar Industries, Inc. 101 B.R. 16 (Bkrtcy.N.D.Ill. 1989). In Thomas Steel, the bankruptcy court for Northern District of Illinois held that such infra-district court removals were not available in the post-Marathon environment in light of the Congressional enactment of 28 U.S.C. §1452 and the language therein providing for removal of cases to the "district court", as opposed to the pre-Marathon provisions of 28 U.S.C. §1478 which provided for removal to the "bankruptcy court."

The most definitive statement found by petitioner with respect to the removability of cases filed originally in the federal district courts is stated in Centrust Savings Bank v. Love, 131 B.R. 64 (S.D.Tex.1991). See also In Re Croley, 121 B.R. 412 (Bkrtcy.D.C. 1990); In Re City Wide Press, Inc., 107 B.R. 68 (Bkrtcy.E.D.Pa. 1989); Helena Chemical Co. v. Manley, 47 B.R. 72 (Bkrtcy. 1985); In Re New York City Shoes, Inc., 1989 WL 112792 (Bankr.E.D.Pa.); In Re Long, 43 B.R. 692 (Bkrtcy. 1984); In Re Watson-Mahaney, Inc., 70 B.R. 578 (Bkrtcy.N.D.Ill. 1987). Compare In Re Northwest Cinema Corp., 49 B.R. 479 (Bkrtcy. 1985); In Re Gianakas, 56 B.R. 747 (N.D. Ill. 1985); In Re Hanson Industries, Inc., 83 B.R. 659 (Bkrtcy.D.Minn. 1988).

C. THIS CASE REQUIRES THE COURT TO

EXERCISE ITS SUPERVISORY ROLE WITH REGARD TO THE PRACTICE OF THE LOWER FEDERAL COURTS.

The Court's supervisory role with respect to lower federal courts requires it to determine if those courts vested with the judicial power of the Constitution's Article III may, in essence, exercise less than all the jurisdiction granted to them by the Congress by permitting or sanctioning the removal within their own court of a private right or constitutional-based case or controversy to the non-Article III courts; namely, the bankruptcy courts which lack the panoply of Article III powers and attributes. See Martin v. Hunter's Lessee, 1 Wheat. 304, 4 L. Ed. 97 (1816). This Court should, therefore, also grant the writ of certiorari because this case raises the issue whether Congress has caused the lower federal courts to be

vested with the discretion to determine the jurisdiction of both Article III courts and non-Article III, or legislative courts as constituted by the Congress. See I.N.S. v. Chadha, 103 Sup. Ct. 2764 (1983); Buckley v. Valeo, 424 U.S. 1 (1976). The seeming uncertainty among the lower federal courts which exercise original jurisdiction in most instances as to the removability of district court cases to their bankruptcy courts through the Rule 9027 notice of removal procedure, raises the issue of the power of lower federal courts to rule on the jurisdictional path which any given case or controversy may take, including the reviewability of that case's proper original jurisdiction. See 28 U.S.C. § 1452(b). See also Supreme Court Rule 10.1.(a).

D. THIS COURT SHOULD GRANT THE WRIT BECAUSE THIS CASE RAISES THE ISSUE OF

WHETHER THE LOWER FEDERAL COURTS HAVE DEPARTED FROM ACCEPTED JUDICIAL PRACTICE IN MISINTERPRETING THE PLAIN MEANING OF SECTION 1452, TITLE 28 U.S.C.

The plain meaning of the language of 28 U.S.C. §1452 indicates that the court below has departed from accepted judicial practice as to interpretation of statutes.

In light of the clear Congressional recognition of the infirmities of the pre-1984 bankruptcy jurisdiction as invalidated by the Marathon decision, it seems highly unlikely that the Congress did not have a clear purpose or intention in substituting the words "district court" for the words "bankruptcy court" in the recast removal statute now codified as 28 U.S.C. §1452. Therefore, the role of the courts in interpreting the statute and its meaning should be elemental. See Cardozo, THE NATURE OF THE JUDICIAL PROCESS (Yale Univ. Press, 1921) at pp. 14-15.

The relevant statutes defining the words "district court" and "district court of the United States" as set forth in Title 28 of the United States Code make this process of interpretation luminously clear. 28 U.S.C. §451, the definitional section of Chapter 21 of the Judicial Code states: "The terms 'district court' and 'district court of the United States' mean the courts constituted by chapter 5 of this title."

Chapter 5 of title 28 U.S.C. is specifically titled "District Courts"; Chapter 6 of title 28 U.S.C. is titled "Bankruptcy Judges" and includes §§ 151-158 of title 28 as codified in the wake of the revisions commonly known as the Bankruptcy Amendments and Federal Judgeship Act, Pub. L. 98-353. Therefore, clearly, by definition, the Congress could not have intended the courts as constituted under Chapter 6 of title 28 to

constitute "district courts" for the purposes of 28 U.S.C. § 1452. To do so, moreover, would have negated the stated reason for Congress undertaking its seemingly painstaking revision of the jurisdictional structure of bankruptcy courts in the wake of the decision by this Court in Marathon, supra. And while the relevant portion of 28 U.S.C. §151 states that bankruptcy judges constitute a "unit of the district court", it does not follow from that that any of the judges as constituted by Chapter 6 of title 28 actually constitute a separate district court to which removal might lie under the authority of 28 U.S.C. §1452.

E. THIS CASE RAISES THE ISSUES SET FORTH IN THE ONLY LIKELY CONTEXT IN WHICH REVIEW WILL BE AVAILABLE IN THIS COURT.

This court should grant petitioner's request for a writ of certiorari because this is one of the few contexts in which

this issue is likely to be reviewable by this Court. The Congress has specifically legislated away the most probable context in which review of the propriety of what petitioner has termed "infra-district court" removals would be reviewed. 28 U.S.C. §1452(b) makes unreviewable in this Court or the courts of appeals an order remanding a claim or a cause of action, or a decision to not remand. Therefore, it would appear that should the district courts allow or provide for cases originally filed in the district court (notwithstanding the existence of jurisdiction in the bankruptcy courts) to be removed, the proper original jurisdictional of any particular case or claim will be irretrievably lost in the procedural shuffle, or simply foreclosed from review by any higher court. In fact, one can conceive of the hypothetical situation in which a case might be removed

to the bankruptcy court, the bankruptcy court be devoid of jurisdiction to rule on the merits, and the issue of remand (i.e., district court adjudication of the case) remain beyond the reach of the courts of appeal and of this Court. This presents a situation that makes the constitutional predicament in Marathon seem mild by comparison. And, it is the foregoing - context of unreviewability which now requires this Court to find that the decision to deny petitioner a default judgment in the district court must necessarily be a collateral decision or order, subject to review prior to final judgement under the doctrine enunciated by the Court in Cohen, supra; see also Pacor, Inc. v. Higgins, 743 F.2d 984 (1984).

VIII.

CONCLUSION

This Court should therefore grant this petition for writ of certiorari because it

falls squarely within the criteria of Supreme Court Rule 10 dealing with considerations governing review on writ of certiorari:

1) The decision of the lower federal courts appears to sanction a departure from accepted and usual course of judicial proceedings by permitting a case lodged originally in the United States District Court to be removed from its jurisdiction to its bankruptcy unit, albeit the bankruptcy court lacked subject matter jurisdiction over the matters brought to it; and,

2) the decisions of the lower courts leave unsettled an important question of federal law. Moreover, it is unlikely that this question can be settled except within the procedural posture the petitioner now presents to the Court. Thus, the matter is susceptible of evading review in any other context.

For all the foregoing reasons, petitioner submits respectfully that a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

Respectfully submitted,

11/24/92 Albert Turner Goins, Sr.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2542MNMI

N. Walter Goins,

Appellant, Appeal from the United States District Court for the District of Minnesota

vs.

Dale W. Lang; Ronald R Jensen; Halcomm, Inc., a Minnesota corporation; KX Acquisition Limited Partnership, a Minnesota limited partnership, and their officers and directors, and the signatories, lenders and participants in a November 30, 1988 Letter Agreement of Halcomm; KTMA Acquisition Corp., a New York corporation; Red River Broadcast Corp., a Minnesota corporation, including Syndicated Communications, Inc. of Washington, D.C. and its subsidiary, Syncom Capital Corp.; Broadcast Capital, Incorporated, a Virginia corporation; Donald R. Johnston; Larry B. Ricke; Thomas J. Lallier,

Appellees.

JUDGMENT

Appellees' motion to dismiss the appeal has been considered by the court and is granted. It is hereby ordered that this appeal be dismissed for lack of jurisdiction.

July 17, 1992

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eightn Circuit.

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

N. Walter Goins, Civil 4-92-154

Plaintiff,

v. ORDER

Dale W. Lang, Ronald R. Jensen, Halcomm, Inc., KX Acquisition Limited Partnership, KTMA Acquisition Corp., Red River Broadcast Corp., Broadcast Capital, Donald R. Johnston, Larry B. Ricke, Thomas J. Lallier,

Defendants.

Because this case has been removed to Bankruptcy Court, IT IS HEREBY ORDERED that plaintiff's motion "to strike a

pleading" scheduled by plaintiff's counsel for May 18, 1992, at 11:00 a.m. before the undersigned United States Magistrate Judge is stricken from the calendar.

Dated: April 14, 1992.

FRANKLIN L. NOEL

United States Magistrate Judge

FILED Apr 15 1992

Francis E. Dosal, Clerk

Judgement Entered_____

Deputy Clerk's Initials__

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:
KTMA Acquisition Corp.,
d/b/a KTMA TV 23,
Debtor.

BKY 4-89-3530

N. Walter Goins,

ADV 4-92-85

Plaintiff,

v.

ORDER DENYING MOTION TO DISMISS

Dale W. Lang, Ronald R. Jensen, Halcomm, Inc., a Minnesota corporation, KX Acquisition Limited Partnership, a Minnesota limited partnership, and their officers and directors, and the signatories, lenders and participants in a November 30, 1988 Letter Agreement of Halcomm, KTMA Acquisition Corp., a New York corporation, and Red River Broadcast Corp., a Minnesota corporation, including Syndicated Communications, Inc., of Washington, D.C. and its subsidiary, Syncom Capital Corp., and Broadcast Capital Incorporated, a Virginia corporation, and Donald R. Johnston, Larry B. Ricke and Thomas J. Lallier,
Defendants.

At Minneapolis, Minnesota, May 4, 1992.

This proceeding came on for hearing on the motion of defendants Syndicated Communications, Inc., Syncom Capital Corp., and Broadcast Capital Inc. for dismissal of the plaintiff's complaint against them. Michael Berens appeared on behalf of the moving defendants; Jan Stuurmans appeared on behalf of defendants KTMA Acquisition Corporation, Donald R. Johnston, and Larry B. Ricke; Albert Turner Goins appeared on behalf of the plaintiff.

For reasons stated orally and recorded in open court and based on the conclusion that the court lacks subject matter jurisdiction over the plaintiff's claims against the moving defendants,

IT IS ORDERED: The motion of defendants Syndicated Communications, Inc., Syncom Capital Corp., and Broadcast Capital Inc. for dismissal of the

plaintiff's complaint against them is denied.

ROBERT J. KRESSEL

CHIEF UNITED STATES BANKRUPTCY JUDGE

NOTICE OF ENTRY AND FILING OF JUDGMENT

Filed and Docket Entry made on May 04 1992

Patrick G. De Wane, Clerk, By lmh .

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

N. Walter Goins,
Plaintiff, Civil 4-92-154
v. MEMORANDUM AND ORDER

Dale W. Lang, Ronald R. Jensen, Halcomm, Inc., a Minnesota corporation, KX Acquisition Limited Partnership, a Minnesota limited partnership and their officers and directors, and the signatories, lenders and participants in a November 30, 1988 letter agreement of Alcomm; KTMA Acquisition Corp., a New York corporation; Red River Broadcast Corp., a Minnesota corporation, including Syndicated Communications, Inc. of Washington, D.C. and its subsidiary, Syncom Capital Corp.; Broadcast Capital Incorporated, a Virginia corporation; Donald R. Johnston, Larry B. Ricke, and Thomas J. Lallier,
Defendants.

Albert T. Goins, Goins Law Office, 1729 East County Road D, Maplewood, MN 55109, for plaintiff.

Richard Ihrig, Mark A. Jacobson, Lindquist & Vennum, 4200 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402, for defendants Dale W. Lang, Ronald R. Jensen, Halcomm, Inc. and KX Acquisition Limited Partnership.

Michael Berens, Kelly & Berens, 3720 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402, for defendant Broadcast Capital Incorporated.

This matter is before the Court on plaintiff's appeal from the Magistrate Judge's order of April 14, 1992 striking plaintiff's motion to strike a pleading from the calendar.

Defendant KTMA Acquisition Corporation (KTMA) is the debtor in a Chapter 11 proceeding pending since 1989 in the United States Bankruptcy Court for the District of Minnesota. On February 18, 1992, plaintiff commenced this civil action, asserting claims against KTMA, the trustee in bankruptcy, and the trustee's attorney. On March 20, 1992, these three defendants filed a notice of removal pursuant to 28 U.S.C. § 1452(a), Bankr. R. 9027, and Local Bankr. R. 201. On April 9, 1992, plaintiff scheduled a "motion to

strike pursuant to Rule 12" before the Magistrate Judge. On April 14, 1992, before the hearing, the Magistrate Judge struck plaintiff's motion from the calendar on the grounds that this action had been removed to bankruptcy court. Plaintiff appeals this April 14, 1992 order.

The Court, after careful review of all of the briefs submitted by the parties, finds that this action is properly before the bankruptcy court pursuant to either the automatic reference provisions of Local Rule 201, as authorized by 28 U.S.C. §§ 157(a) & 1334, or the filing of defendants' notice of removal under Bankr. R. 9027, see Raff v. Gordon, 58 B.R. 988, 990 (E.D.Pa. 1986); Philadelphia Gold Corp. v. Fauzio (In re Philadelphia Gold Corp.), 56 B.R. 87, 89-90 (Bankr. E.D.Pa. 1985); 1 Collier on Bankruptcy ¶ 3.01, at 3-92 n.153c (15th

ed. 1991). The Magistrate Judge therefore properly found that he lacked jurisdiction to address the merits of plaintiff's grievances.

Accordingly, based upon review of all the files, records, and proceedings, and it appearing to the Court that the order of the Magistrate Judge is not clearly erroneous nor contrary to law, pursuant to 28 U.S.C. § 636(b)(1)(A) and Local Rule 72.1,

IT IS ORDERED that the April 14, 1992 Order of the United States Magistrate Judge is affirmed.

Judge Harry H. MacLaughlin
United States District Court

DATED: May 6, 1992

Filed May 08 1992
Francis E. Dosal, Clerk
Judgement entered_____
Deputy Clerk's Initials__

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re: Bky. No. 4-89-3530-RJK

KTMA Acquisition Corp. d/b/a
KTMA TV 23,
Debtor, Adv. No. 4-92-4085

N. Walter Goins,
Plaintiff,

Dale W. Lang, Ronald R. Jensen, Halcomm, Inc., a Minnesota corporation, KX Acquisition Limited Partnership, a Minnesota limited partnership, and their officers and directors, and the signatories, lenders and participants in a November 30, 1988 Letter Agreement of Halcomm, KTMA Acquisition Corp., a New York corporation, and Red River Broadcast Corp., a Minnesota corporation, including Syndicated Communications, Inc., of Washington, D.C. and its subsidiary, Syncom Capital Corp., and Broadcast Capital Incorporated, a Virginia corporation, and Donald R. Johnston, Larry B. Ricke and Thomas J. Lallier,
Defendants.

ORDER

At Minneapolis, Minnesota, May 13, 1992.

This proceeding came before the court on the ex parte request of Syndicated Communications, Inc., Syncom Capital Corp., and Broadcast Capital Inc. pursuant to Bankruptcy Rule 9006(b) to enlarge the time within which they must serve their responsive pleading to plaintiff's complaint against them until such time as those parties' pending motion to enlarge time may be heard and considered by the court.

Based upon a showing of good cause, IT IS ORDERED:

The time within which defendants Syndicated Communications, Inc., Syncom Capital Corp., and Broadcast Capital Inc. shall serve their responsive pleading to plaintiff's complaint is enlarged to and including May 29, 1992, or until the court issues its order in response to the pending motion of these parties to enlarge time.

Robert J. Kressel

Chief United States

Bankruptcy Judge

NOTICE OF ENTRY AND FILING ORDER OR JUDGMENT

Filed and Docket Entry made on May 14, 1992

Patrick G. De Wane, Clerk; By lmh

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

N. Walter Goins,

Plaintiff,

v.

CIVIL 4-92-154
ORDER

Dale W. Lang, Ronald R. Jensen, Halcomm, Inc., a Minnesota corporation, KX Acquisition Limited Partnership, a Minnesota limited partnership and their officers and directors, and the signatories, lenders and participants in a November 30, 1988 letter agreement of Alcomm; KTMA Acquisition Corp., a New York corporation; Red River Broadcast Corp., a Minnesota corporation, including Syndicated Communications, Inc. of Washington, D.C. and its subsidiary, Syncom Capital Corp.; Broadcast Capital Incorporated, a Virginia corporation; Donald R. Johnston, Larry B. Ricke, and Thomas J. Lallier,

Defendants.

Albert T. Goins, Goins Law Office, 1729 East County Road D, Maplewood, MN 55109, for plaintiff.

Richard Ihrig, Mark A. Jacobson, Lindquist & Vennum, 4200 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402, for defendants Dale W. Lang, Ronald R. Jensen, Halcomm, Inc. and KX Acquisition Limited Partnership.

FILED MAY 26 1992
FRANCIS E. DOSAL CLERK
JUDGMENT ENTERED_____
DEPUTY CLERK'S INITIALS___

Michael Berens, Kelly & Berens, 3720 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402, for defendant Broadcast Capital Incorporated.

This matter is before the Court on plaintiff's motion for entry of default judgment. However, this Court has already held that this action is properly before the bankruptcy court under either the automatic reference provisions of Local Rule 201, as authorized by 28 U.S.C. §§ 157(a) & 1334, or the filing of defendants' notice of removal under Bankr. R. 9027, see Raff v. Gordon, 58 B.R. 988, 990, (E.D.Pa. 1986); Philadelphia Gold

Corp. v. Fauzio (In re Philadelphia Gold Corp.), 56 B.R. 87, 88-90 (Bankr. E.D.Pa. 1985); 1 Collier on Bankruptcy ¶ 3.01, at 3-92 n. 153c (15th ed. 1991). Plaintiff's motion will therefore be denied.

IT IS ORDERED that plaintiff's motion for entry of default judgment is denied.

Judge Harry H. MacLaughlin
United States District Court

DATED: May 26, 1992

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

KTMA ACQUISITION CORP., d/b/a KTMA TV 23,

Debtor,

TRANSMITTAL OF REMANDED ADVERSARY PROCEEDING PAPERS TO CLERK OF DISTRICT COURT

No. CIV 4-92-154
No. BKY 4-89-3530
No. ADV 4-92-85-RJK

N. WALTER GOINS,

Plaintiff,

v.

DALE W. LANG, RONALD R. JENSEN, HALCOMM, INC., a Minnesota corporation, KX ACQUISITION LIMITED PARTNERSHIP, a Minnesota limited partnership, and THEIR OFFICERS AND DIRECTORS, AND THE SIGNATORIES, LENDERS AND PARTICIPANTS IN A NOVEMBER 30, 1988 LETTER AGREEMENT OF HALCOMM, KTMA ACQUISITION CORP., A New York corporation, and RED RIVER BROADCAST CORP., a Minnesota corporation, including SYNDICATED COMMUNICATIONS, INC., OF WASHINGTON, D.C. AND ITS SUBSIDIARY, SYNCOM CAPITAL CORP., and BROADCAST CAPITAL INCORPORATED, a Virginia corporation, and DONALD R. JOHNSTON, LARRY B. RICKE and THOMAS J. LALLIER,

Defendants.

To: Clerk of District Court.

By order of remand dated May 29, 1992, filed and docket entry made on June 1, 1992, of Chief U.S. Bankruptcy Judge

Robert J. Kressel, this adversary proceeding has been remanded to the district court under Rule 9027(d) F.R.Bkr. P. Your original civil action file, a certified copy of our docket, and copies of all papers filed in the bankruptcy court after removal to the bankruptcy court, which copies are hereby certified to be true copies of the originals on file in this office, are enclosed.

Dated: June 9, 1992. PATRICK G. DE WANE
Clerk of Bankruptcy Court

cc: Counsel or parties and
United States Trustee By Shelia Jones
Deputy Clerk

060992

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No.92-2542MNMI

N. Walter Goins,

Appellant,

vs.

Dale W. Lang, et al.,

Appellees.

Appeal from the United States District District Court for the District of Minnesota

The motion of appellant N. Walter Goins for an extension of time until August 14, 1992, to file a petition for rehearing is granted.

July 27, 1992

Order Entered Under Rule 27B(a):

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No.92-2542MNMI

N.Walter Goins,

Appellant,

vs.

Dale W. Lang, et al., Appellees.

Appeal from the

United States

District Court

for the District

of Minnesota

The petition for rehearing by the panel is denied.

September 1, 1992

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

(2)

No. 92-951

Supreme Court, U.S.
FILED
DEC. 18 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

N. WALTER GOINS,

Petitioner,

v.

DALE W. LANG, *et al.*,

Respondents.

Response Of Syndicated Communications, Inc., Syncom Capital Corporation, and Broadcast Capital, Inc. To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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**Counsel Of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8380

BEST AVAILABLE COPY

21pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether the routine dismissal for lack of jurisdiction by the United States Court of Appeals for the Eighth Circuit of petitioner's premature appeal of the district court's interlocutory order denying a default judgment presents an appropriate question for issuance of a writ of certiorari, when: (a) there is no conflict amongst the courts of appeals with respect to this issue; and (b) the Eighth Circuit's dismissal of petitioner's interlocutory appeal of the denial of a default judgment was unquestionably correct.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-951

N. WALTER GOINS,

Petitioner,

v.

DALE W. LANG, *et al.*,

Respondents.

Response Of Syndicated Communications, Inc., Syncom Capital Corporation, And Broadcast Capital, Inc. To Petition For A Writ of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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BRIEF IN OPPOSITION

Respondents Syndicated Communications, Inc. ("Syndicated Communications"), its subsidiary Syncom Capital Corp. ("Syncom"), and Broadcast Capital, Inc. ("Broadcap")[1] hereby file this response to Petition

[1] Pursuant to Rule 29, Sup. Ct. Rules, the following information is provided: Syndicated Communications, Inc. has no parent corporation, and all of its subsidiary corporations are wholly-owned. The parent of Syncom Capital Corporation is Syndicated Communications, Inc., and Syncom Capital Corporation has no subsidiaries. The parent of Broadcast Capital, Inc. is Broadcast Capital Fund, Inc., and the sole subsidiary corporation of Broadcast Capital, Inc. is wholly-owned.

for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit") entered on July 17, 1992 in No. 92-2542 dismissing for lack of jurisdiction the appeal by petitioner N. Walter Goins ("Goins") of the interlocutory order of the United States District Court for the District of Minnesota ("District Court") denying Goins's application for a default judgment.

I.

CONSTITUTIONAL PROVISIONS

This case does not involve any constitutional provisions.

II.

STATUTES INVOLVED

28 U.S.C. § 1291:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. . . .

III.

COUNTERSTATEMENT OF THE CASE

A. The Complaint.

On or about February 18, 1992, petitioner Goins filed a complaint in the District Court against various parties, including respondents Syndicated Communi-

cations, its subsidiary Syncom, and Broadcap (hereinafter collectively "Banking Respondents"), which he thereafter served by mail. While the nature of Goins's claims against the Banking Respondents is unclear, his complaint mentions these defendants in four counts alleging, respectively, violations of antitrust laws (Count I), the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq. (Count II), and the Civil Rights Act, 42 U.S.C. §§ 1983, 1985 (Counts V and VII).

Goins filed a minor amendment to this complaint on February 23, 1992, amending by interlineation Paragraph 26 of the original complaint. On March 17, 1992, the Banking Respondents acknowledged receipt of the amended complaint. Their answer was therefore due on April 6, 1992.

B. The Removal To Bankruptcy Court.

On March 20, prior to the date that the answer of the Banking Respondents was due, three of the defendants (KTMA Acquisition Corp., Donald R. Johnston, and Larry B. Ricke) filed a notice of removal ("Notice of Removal") under Bankruptcy Rule 9027, removing the entire case to the United States Bankruptcy Court for the District Of Minnesota ("Bankruptcy Court"). The grounds for the notice were that KTMA Acquisition Corp. was the debtor in a Chapter 11 proceeding then pending in the Bankruptcy Court. Johnson was the trustee of the debtor, and Ricke was counsel to the trustee. The Notice Of Removal noted that Goins had appeared in that Chapter 11 proceeding and had filed six pleadings therein.

C. The Motion To Dismiss.

On April 6, 1992, the Banking Respondents filed in Bankruptcy Court where the action was then pend-

ing a motion to dismiss pursuant to Bankruptcy Rule 7012(b) for failure to state a claim and for lack of personal jurisdiction, with supporting documents, and noticed a hearing on that motion for May 1, 1992. Various affidavits were submitted with the motion to dismiss, and the motion noted that if the affidavits were considered, the motion should be treated as one for summary judgment.

On April 9, 1992, Goins filed in District Court a motion to strike all the pleadings in the case referring to or bearing the caption of the bankruptcy matter. On April 14, 1992, the United States Magistrate assigned to the case denied the motion to strike, reciting that the case had been removed to Bankruptcy Court.

On April 21, 1992, Goins filed in Bankruptcy Court a "Notice of Jurisdictional Objection," arguing that the Bankruptcy Court did not have jurisdiction over the action and, consequently, the Banking Respondents' motion to dismiss, for a variety of reasons. On May 4, 1992, the Bankruptcy Court issued an order ruling that it did not have jurisdiction over Goins's claims against the Banking Respondents and therefore denied the Banking Respondents' motion to dismiss. Petitioner's Appendix ("App") III, at 2. Upon receiving the Bankruptcy Court's order, the Banking Respondents immediately refiled their motion to dismiss in the District Court on May 4, 1992.

D. The Application For A Default Judgment.

On May 10, Goins filed an Application For A Default Judgment in the District Court. Goins's motion asserted that the District Court should enter a default

judgment because the Banking Respondents originally filed their motion to dismiss in Bankruptcy Court, to whence the action had been removed and was pending, rather than in the District Court. On May 26, 1992, the District Court denied sua sponte Goins's motion for a default judgment. Respondents' Appendix ("R. App.") A, at 2a. On May 29, 1992, the Bankruptcy Court remanded the case to the District Court.

E. Appeal Of The Interlocutory Order Denying Default.

On June 12, 1992, Goins appealed the District Court's interlocutory order denying his motion for a default judgment to the United States Court Of Appeals For The Eighth Circuit. R. App. B, at 3a. On July 8, 1992, the Banking Respondents moved to dismiss the appeal in the Eighth Circuit for lack of jurisdiction on the grounds that the denial of Goins's motion for a default judgment was not an appealable order. R. App. C, at 4a.

On July 17, 1992, the Eighth Circuit granted the Banking Respondents' motion to dismiss and ordered that Goins's appeal "be dismissed for lack of jurisdiction." App. I, at 2. On September 1, 1992, the Eighth Circuit denied Goins's petition for rehearing. App. IX, at 1. On November 30, 1992, Goins petitioned this Court for a writ of certiorari of the Eighth Circuit's dismissal of the appeal of the District Court's interlocutory order denying his motion for a default judgment.

F. Final Judgment And The Pending Eighth Circuit Appeal.

On October 10, the District Court entered an order treating the Banking Respondents' motion to dismiss as one for summary judgment and granting that mo-

tion. On November 12, 1992, Goins's noticed an appeal of this final order to the Eighth Circuit. R. App. D, at 6a. This appeal is now pending before the Eighth Circuit.

IV.

SUMMARY OF THE ARGUMENT

Goins's petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be denied. The judgment as to which review is sought is a routine determination by the Eighth Circuit declining to accept a premature appeal from a non-appealable interlocutory order denying a motion for a default judgment. Moreover, the subject matter of the premature appeal is presently pending before the Eighth Circuit.

V.

REASONS WHY THE WRIT SHOULD BE DENIED

A. The Eighth Circuit's Routine Dismissal Of Goins's Premature Appeal Of An Interlocutory Order Raises No Issues For Which A Writ Of Certiorari Should Issue.

Goins's convoluted and opaque attempt to convert a simple and routine dismissal of his premature appeal of an interlocutory order into various Article III constitutional issues is meritless. The general appellate jurisdictional statute, 28 U.S.C. § 1291, provides that the courts of appeal shall have jurisdiction of "final decisions" of the district courts. It is blackletter law that an interlocutory order denying a motion for a default judgment is not such an appealable order. *Bird v. Reese*, 875 F.2d 256 (9th Cir. 1989) (court of appeals held it had no jurisdiction over appeal of district court

order denying motion for a default judgment because "such a denial is not a final appealable order"); *McNutt v. Cardox Corp.*, 329 F.2d 107, 108 (6th Cir. 1964) ("order denying a motion for a default judgment is not an appealable order"); 15A Wright, Miller & Cooper, *Federal Practice and Procedure* § 3914.5 (2d ed. 1986).

Moreover, an order denying a motion for a default judgment does not satisfy the requirements of the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), because denial of a default judgment can "be reviewed on appeal from the court's final judgment on the merits." *Adult Film Ass'n of America v. Thetford*, 776 F.2d 113, 114-15 (5th Cir. 1985). Therefore, the Eighth Circuit correctly concluded that it did not have jurisdiction to entertain an appeal of the District Court's interlocutory order, and correctly dismissed Goins's appeal for lack of jurisdiction.

Accordingly, Goins's petition raises no issues for which a writ of certiorari should issue. There is no conflict between the circuits with respect to the appealability of the denial of a default judgment, and the Eighth Circuit's conclusion that the District Court's order denying the default judgment was a non-appealable interlocutory order was eminently correct. Rule 10, Sup. Ct. Rules.

B. The Issue With Respect To Which A Writ Of Certiorari Is Sought Is Presently Before The Eighth Circuit In A Separate Pending Appeal.

On October 10, 1992, the District Court granted the Banking Respondents (as well as the other defendants') motions for summary judgment, and dismissed Goins's state law claims. Judgment was en-

tered on October 13, 1992. On November 12, 1992, Goins appealed from that judgment to the Eighth Circuit, which appeal is now pending. R. App. D, at 6a.

That appeal incorporates all intermediate, interlocutory, and previously non-appealable orders of the District Court. Accordingly, the very claim as to which Goins's seeks a writ of certiorari—whether the United States District Court properly exercised its discretion in denying a motion for a default judgment—is presently pending before the Eighth Circuit.

VI.

CONCLUSION

The Eighth Circuit's routine dismissal for lack of jurisdiction of Goins's premature appeal of the District Court's interlocutory order denying a default judgment presents no issues for which a writ of certiorari should issue. In addition, in light of the complete lack of merit of Goins's petition, the Banking Respondents further request, pursuant to Rule 42, Sup. Ct. Rules, an award of double costs and their attorneys' fees in opposing Goins's petition.

WHEREFORE, the Banking Respondents respectfully request this Court to deny Goins's petition for a writ of certiorari, and further request this Court to award them double their costs and their attorneys' fees.

Respectfully submitted,

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and

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Counsel For Respondents Syndicated Communications, Inc., Syncom Capital Corp., and Broadcast Capital, Inc.

**Counsel of Record*

Date: December 18, 1992

APPENDIX

RESPONDENTS' APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

CIVIL 4-92-154

N. Walter Goins,

Plaintiff,

v.

Dale W. Lang, Ronald R. Jensen, Halcomm, Inc., a Minnesota corporation, KX Acquisition Limited Partnership, a Minnesota limited partnership and their officers and directors, and the signatories, lenders and participants in a November 30, 1988 letter agreement of Alcomm; KTMA Acquisition Corp., a New York corporation; Red River Broadcast Corp., a Minnesota corporation, including Syndicated Communications, Inc. of Washington, D.C. and its subsidiary, Syncom Capital Corp.; Broadcast Capital Incorporated, a Virginia corporation; Donald R. Johnston, Larry B. Ricke, and Thomas J. Lallier,

Defendants.

O R D E R

This matter is before the Court on plaintiff's motion for entry of default judgment. However, this Court has already held that this action is properly before the bankruptcy court under either the automatic reference provisions of Local Rule 201, as authorized by 28 U.S.C. §§ 157(a) & 1334, or the filing of defendants' notice or removal under Bankr. R. 9027, *see Raff v. Gordon*, 58 B.R. 988, 990 (E.D. Pa. 1986); *Philadelphia Gold Corp. v. Fauzio* (*In re Philadelphia Gold Corp.*), 56 B.R. 87, 89-90 (Bankr. E.D. Pa. 1985); 1 *Collier on Bankruptcy* ¶ 3.01, at 3-92 n.153c (15th ed. 1991). Plaintiff's motion will therefore be denied.

IT IS ORDERED that plaintiff's motion for entry of default judgment is denied.

/s/ Harry H. McLaughlin
Judge Harry H. McLaughlin
United States District Court

DATED: May 26, 1992

RESPONDENTS' APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
MINNESOTA DISTRICT
FOURTH DIVISION

Civil No. 4-92cv154 (HHM)

N. Walter Goins,

Plaintiff,

vs.

Dale W. Lang, et al.,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that N. Walter Goins, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the order denying Plaintiff's motion or application for default judgment against Defendants Syndicated Communications, Inc. and Broadcast Capital Corp. entered in this action by the Court on twenty-sixth day of May, 1992.

June 12, 1992

Respectfully submitted,

/s/ Albert Turner
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(126159)
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(612) 777-4757 tel.

RESPONDENTS' APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

United States District Court
File No.: Civil 4-92-154

N. Walter Goins,

Appellant,

v.

Dale W. Lang, Ronald R. Jensen, Halcomm, Inc., a Minnesota corporation, KX Acquisition Limited Partnership, a Minnesota limited partnership, and their officers and directors, and the signatories, lenders and participants in a November 30, 1988 Letter Agreement of Halcomm, KTMA Acquisition Corp., a New York corporation, and Red River Broadcast Corp., a Minnesota corporation, including Syndicated Communications, Inc., of Washington, D.C. and its subsidiary, Syncom Capital Corp., and Broadcast Capital Incorporated, a Virginia corporation, and Donald R. Johnston, Larry B. Ricke and Thomas J. Lallier,

Appellees.

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

Appellees Syndicated Communications, Inc., Syncom Capital Corp., and Broadcast Capital Incorporated, hereby move the court to dismiss the appeal in the captioned matter. Appellant has appealed from an order of the United States District Court for the District of Minnesota denying his motion for default judgment. Such an order is not an appealable final order under 28 U.S.C. § 1291. Accordingly, this court does not have jurisdiction of this appeal.

Dated: July 8, 1992

KELLY & BERENS, P.A.

/s/ Michael Berens
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RESPONDENTS' APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil 4-92-154

N. Walter Goins,

Plaintiff,

v.

Dale W. Lang, et al.,

Defendants.

NOTICE OF APPEAL

Plaintiff, N. Walter Goins, hereby notices his appeal to the United States Court of Appeals for the Eighth Circuit pursuant to the Federal Rules of Appellate Procedure as to the judgment of the United States District court for the District of Minnesota entered on October 13, 1992 excepting the portion of that judgment granting summary judgment in favor of defendants Donald R. Johnston and Larry B. Ricke, and defendant Thomas J. Lallier as to all of plaintiff's federal claims against Donald R. Johnston and Larry B. Ricke, and Thomas J. Lallier.

Dated: November 12, 1992

Respectfully submitted,

/s/ Albert Turner Goins, Sr.
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Supreme Court, U.S.
FILED
DEC 28 1992
OFFICE OF THE CLERK

(3)

No. 92-951

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

N. WALTER GOINS, PETITIONER,

-VS-

DALE W. LANG, ET AL., RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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6 pp

Petitioner, N. Walter Goins, respectfully submits this Reply Memorandum to the Brief in Opposition of Respondents Syndicated Communications, Inc., Syncom Capital Corp., and Broadcast Capital, Inc. (hereinafter "the SBIC Respondents") dated December 18, 1992.

In opposing this Court's review by petition for writ of certiorari, the SBIC Respondents consistently attempt to trivialize and mischaracterize the scope of the issues presented to the Court for review. And, in so doing, the SBIC Respondents wholly ignore the doctrine enunciated by the Court in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). See Respondents' Brief in Opposition at p.7. By attempting to essentially re-write Petitioner's submission to the Court, and by also ignoring the sole stated basis for the denial of default judgment in the trial

court (the United States District Court for the District of Minnesota), the SBIC Respondents attempt to persuade this Court that this is a "premature appeal of an interlocutory order" merely having to do with a "routine dismissal for lack of jurisdiction" in the lower courts.

The SBIC Respondents calculated efforts to read out of the district court order the reasoning for its denial of petitioner's default judgment motion not only ignores the procedural history of the case, but also effectively conceals their likely argument should petitioner have awaited "final judgment" to seek review of the denial of default judgment. As this Court may readily discern, it is probable that upon an appeal after final judgment, these SBIC Respondents would claim that the act of "refiling" in the district court after the bankruptcy court's denial of their motion,

but prior to an order of remand would constitute an informal appeal of the bankruptcy court order under 28 U.S.C. §158(a), which allows for appeals from final and interlocutory orders of bankruptcy judges to the district courts.

Therefore, the effort of petitioner to appeal the denial of default judgment would, after final judgment, become effectively unreviewable because the essential beginning point (or the nature of the first defense by SBIC Respondents) in the case would become procedurally obscure, if not eclipsed--unless the district court's action is reviewed in the context of its actions in passing upon the availability of removal and the SBIC Respondents' original footing in the case. Compare Connecticut National Bank v. Germain, 60 L.W.4222 (U.S. Sup. Ct.) March 10, 1992.

One can logically conclude that these

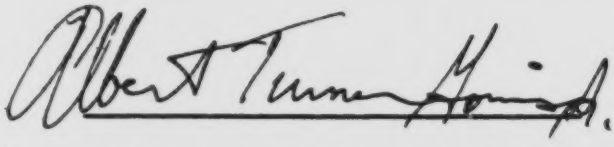
Respondents knew, prior to any order of remand, that this action had not, and could not, be properly removed within the confines of the United States District Court for the Minnesota District to the bankruptcy court and therefore that their first defense in the United States District Court for the District of Minnesota was untimely and the removal ineffectual as to them. The SBIC Respondents may contend this is convoluted and opaque logic, but the petitioner submits their procedural default is as clear as a bell.

Moreover, if this Court should be so naive as the SBIC Respondents now seem to believe, and if this is merely a routine denial of a default judgment--without more--then the Court may expect that the purpose and holding of its earlier decisions regarding the judicial power of the United States will be routinely

ignored through a procedural "shell-game" by parties having no claim or right to evaporate into the bankruptcy court upon being served with a summons in an original action in the Article III federal courts.

Indeed, the Court may, in light of the apparent admission of the SBIC Respondents as to untimeliness of their defense in the district court and the failure to argue the propriety of the removal, reverse summarily on the merits and grant petitioner the relief sought in the district court against the SBIC Respondents.

Respectfully submitted,



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December 24, 1992